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In the Supreme Court of the United States

OCTOBER TERM, 1984

HELEN S. VANCE, ET AL., PETITIONERS

v.

TENNESSEE VALLEY AUTHORITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners, who allegedly relied upon a 1943 contract obligating the Department of the Interior to construct a road contingent upon appropriation by Congress of all necessary funds, may, despite the subsequent failure of Congress to make such appropriations, obtain a mandatory injunction compelling the Department to build the road on a theory of "equitable estoppel."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-27a) is reported at 738 F.2d 1418. The opinion of the district court (Pet. App. 32a-56a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 1984. A petition for rehearing was denied on September 17, 1984 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on December 13, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners, the heirs of deceased persons buried in cemeteries located north of Fontana Lake in Swain County, North Carolina, filed this action in the United States District Court for the Western District of North Carolina in

May 1983. Petitioners claimed that respondents, the Tennessee Valley Authority (TVA), the Department of the Interior, the Secretary of the Interior, the State of North Carolina, and Swain County, have acted to deny vehicular access[1] to the cemeteries in violation of petitioners' contractual, property, and constitutional rights. Petitioners sought to compel TVA to lower the water level in Fontana Lake "sufficiently below State Road 288 to allow free, open and undisturbed access" to the cemeteries (Pet. App. 79a) or, in the alternative, to require the Department of the Interior to construct a road along the north shore of the lake. In addition, petitioners sought the return of the property acquired by TVA in order to build the Fontana Dam to the grantors or their successors in interest (*ibid.*).

The controversy that gave rise to this litigation stems from the construction of the Fontana Dam on the Little Tennessee River. In 1942, Congress, in order to meet pressing power needs for war production, authorized TVA to build the dam. See *United States ex rel. TVA* v. *Welch*, 327 U.S. 546, 548 (1946). The cemeteries in question are located on a 44,400-acre tract of land that was acquired by the United States in the 1940's on behalf of TVA in connection with the dam project. The only road access to the cemeteries was obstructed in 1944 when State Road 288 was flooded by water impounded to form Fontana Lake. TVA had offered to have the graves relocated to alternative sites at TVA's expense; however, petitioners and their relatives chose to leave their ancestors' remains in their original location.

In 1943, TVA and the other respondents entered into a written contract as a means of extinguishing TVA's liability for flooding the state highway. The contract, which was

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[1]The National Park Service of the Department of the Interior provides free boat access across Fontana Lake to the burial sites (Pet. App. 47a).

upheld by this Court in *United States ex rel. TVA* v. *Welch, supra,* provided in part that the 44,400 acres would be acquired by TVA and transferred to the National Park Service of the Department of the Interior for inclusion in the Great Smoky Mountains National Park. In return, Interior agreed to construct a road through the park along the north side of Fontana Lake. This road, in conjunction with a connecting public road to be built by the State, would have provided vehicular access to the cemeteries in question. Interior's obligation to build the park road, however, was made expressly contingent on the appropriation of funds by Congress (Pet. App. 7a-8a, 85a-86a):

> The obligation of the Department [of the Interior] to construct or provide for the construction of a Park Road as defined in this Section 4 shall be subject to and contingent in all respects upon the appropriation by Congress of all funds necessary for such construction, and failure on the part of Congress for any reason to make such appropriations shall not constitute a breach or violation of this agreement by the Department or any other party hereto.

The State built the connecting road, and Congress appropriated $6,189,000 through fiscal year 1972 for the park road. Three segments of the park road, totalling 5.6 miles, were completed between 1963 and 1968. Due to serious difficulties encountered during construction, however, it was determined by the Park Service that it would be neither environmentally nor economically feasible to complete the approximately 30-mile long road. No major work on the road has occurred since 1972, and there are presently no unexpended funds appropriated for construction of the project. Pet. App. 8a-9a.[2]

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[2]Although Congress has not appropriated the funds necessary for completion of the park road, three bills were introduced in the 98th Congress that, if passed, would have affected the question of vehicular

Petitioners claim (Pet. 10-11) that it was not until 1982 that they learned that vehicular access to the cemeteries would not be provided. Contending that the failure to construct the park road constituted a breach of contract by Interior, petitioners, claiming to be third-party beneficiaries, sought specific performance of the 1943 contract (Pet. App. 78a). Petitioners further contended that the property acquired by TVA and transferred to Interior in 1948 should be returned to the original grantors or their successors in interest because the conveyances were made in reliance on TVA's representation that vehicular access to the cemeteries would be provided (*id.* at 72a-73a). Finally, petitioners claimed that the denial of road access to the grave sites constituted a deprivation of petitioners' freedom of religion in violation of the First Amendment (*id.* at 73a-74a).

2. The district court dismissed the action, holding that petitioners were only incidental beneficiaries of the 1943 agreement and therefore had no standing to sue under the agreement (Pet. App. 55a-56a). The district court did not specifically address the questions whether petitioners' First

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access to the cemeteries. S. 1947, 98th Cong., 1st Sess. (1983); S. 2183, 98th Cong., 1st Sess. (1983); H.R. 4262, 98th Cong., 1st Sess. (1983). Each bill would have designated the lands in question as part of the National Wilderness Preservation System; however, S. 2183, introduced by Senator Helms of North Carolina, provided that such wilderness designation would not take effect until a ten-foot wide, nonpaved, primitive road was constructed to provide vehicular access to the cemeteries. The bill authorized the appropriation of $950,000 for the road construction. S. 1947, introduced by Senators Baker and Sasser of Tennessee, and H.R. 4262, introduced by Representative Duncan of Tennessee, did not include a provision for a park road but provided instead that boat access to the cemeteries would be continued. See *Great Smoky Mountains Wilderness Act: Hearings on S. 1947 and S. 2183 Before the Subcomm. on Public Lands and Reserved Water of the Senate Comm. on Energy and Natural Resources*, 98th Cong., 2d Sess. 366-372 (1984) (statement of Russell E. Dickenson, Director, National Park Service).

Amendment rights had been violated or whether Interior's failure to construct the road should cause the deeds of conveyance to be rescinded.[3]

3. A divided panel of the court of appeals affirmed on a different ground, concluding "that whether or not [petitioners] have standing to sue is immaterial, because we find that any agreement to construct a road was never breached" (Pet. App. 13a). The court held that "[b]ecause the 1943 contract so clearly provided that Interior's obligation to construct a road was in *all respects* contingent upon the appropriation of *all necessary funds,* [petitioners] would never be able to demonstrate a breach of agreement" (*id.* at 17a (emphasis in original)). The court also held that petitioners could not assert an estoppel-type argument against respondents based on alleged promises to construct the park road because the 1943 contract "specifically provided that 'failure on the part of Congress *for any reason* to make such appropriations shall not constitute a breach or violation of this agreement by the Department [of the Interior] or any other party hereto' " (*ibid.* (emphasis in original)). The promises and inducements concerning the road's construction allegedly made by government representatives were held by the court to have "at least implicitly incorporated the provisions of the 1943 written contract * * *, including the contingency of a congressional appropriation" (*id.* at 16a (footnote omitted)).[4]

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[3]The district court did, however, note the "drastic" nature of the relief sought, observing that it would cost approximately $19,300,000 to replace the electricity production that would be lost if Fontana Lake were lowered below State Road 228 (Pet. App. 47a-48a). The court also noted that completion of the park road would cost "in the millions of dollars" and would likely result in additional litigation brought by persons opposed to the building of a road in a wilderness area (*id.* at 48a-49a).

[4]Chief Judge Winter dissented (Pet. App. 19a-27a), suggesting that the case should be remanded to the district court for further proceedings

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review by this Court is not warranted.

1. Petitioners contend (Pet. 12-15) that the refusal of the court of appeals to apply the doctrine of equitable estoppel conflicts with decisions of other courts of appeals. That result, however, was not predicated on a holding that estoppel may not in any circumstances run against the government. Instead, the court of appeals merely concluded, in view of the factual record, that "this is not a case where [petitioners] could assert an estoppel-type argument" (Pet. App. 17a). In *Heckler* v. *Community Health Services*, No. 83-56 (May 21, 1984), slip op. 9, this Court recently held that "however heavy the burden might be when an estoppel is asserted against the Government, the private party surely cannot prevail without at least demonstrating that the traditional elements of an estoppel are present." There is no basis for reviewing the court of appeals' conclusion that petitioners did not meet the traditional requirements for estoppel.

Although petitioners contend that the government promised or misrepresented that the park road would be constructed without regard to the availability of appropriations, it is clear from the face of the complaint that petitioners have no reasonable basis for making such a claim or for asserting (Pet. 20) that "Interior and its TVA

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with respect to whether respondents are obliged to construct an access road based on promises and inducements made independently of the 1943 agreement. He also disagreed with the majority's conclusion that there has been no breach of the 1943 agreement, asserting that Interior breached the contract by failing to seek further appropriations from Congress.

agents grossly misled petitioners or their relatives concerning access to the cemeteries." As noted by the court of appeals (Pet. App. 9a-10a), petitioners specifically alleged in their complaint (*id.* at 65a-66a (emphasis added)):

> That at the time of the acquisition of lands by purchase or condemnation, the acquisition team of the TVA represented to the Plaintiffs or their heirs and others that access to the area purchased would be provided by a newly constructed road and *produced copies of the* [1943] *contract between the government and the people of the State of North Carolina as an enticement or an inducement to sell their lands* and insuring to them access to the area for the purposes of preservating [sic] ingress and egress to the cemeteries in the subject area.

Petitioners thus alleged that they were told about the 1943 agreement and that they were shown copies of it.[5] Petitioners further alleged in their complaint that they "were directly advised, promised, and represented that upon the transfer of their lands and property that their rights of access to the cemeteries would be protected and preserved *by the road hereinabove referred to*" (Pet. App. 72a (emphasis added)). Because the representations concerning the road were, by petitioners' own admission, made with reference to the 1943 contract — including the appropriations contingency clause —the government made no "definite misrepresentation of fact," an essential element of an estoppel claim. *Community Health Services,* slip op. 7

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[5]Petitioners claimed below that they were unsophisticated individuals who would have opted for relocation of the graves had they known of the contingent nature of the 1943 contract. Cf. Pet. 19. The record does not support such a contention; indeed, it is belied by the allegation in the complaint (Exh. A) that the relatives of some 612 deceased persons accepted TVA's offer to relocate graves to other cemeteries having vehicular access.

(quoting Restatement (Second) of Torts § 894(1) (1977)).[6] Petitioners thus have not demonstrated "that the traditional elements of an estoppel are present." *Community Health Services,* slip op. 9.

2. In any event, it is fundamental that no executive department or agency of the government can bind Congress to appropriate money for the construction of any public project. Article I, § 9, Cl. 7 of the Constitution provides that "No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law." See also *Hooe* v. *United States,* 218 U.S. 322, 334 (1910) ("If an officer, upon his own responsibility and without the authority of Congress, assumes to bind the Government, by express or implied contract, to pay a sum in excess of that limited by Congress for the purposes of such a contract, the contract is a nullity, so far as the Government is concerned, and no legal obligation arises upon its part to meet its provisions.").

It is undisputed that there are no congressional appropriations available for construction of a park road. Thus, even if petitioners could point to an enforceable contract to construct a road to the cemeteries, there could be no duty on the part of the government to build such a road unless, and until, Congress appropriates the money to do so. Indeed, as comtemplated by Article I, § 9, Cl. 7 of the Constitution, petitioners' proper, and sole, recourse for the relief they seek (vehicular access to the cemeteries) is through the

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[6]The July 31, 1943, letter (Pet. App. 89a-91a), dated one day after the 1943 agreement was executed, likewise cannot support an estoppel claim. The letter, which contained an offer to relocate graves that was *rejected* by petitioners, cannot constitute a "contract" for the construction of a road. In any event, the road referred to in the letter, as found by the court of appeals, is clearly "the road proposed to be built in accordance with the terms of the just executed 1943 contract, including the requirement for congressional funding" (Pet. App. 17a n.5).

legislative process, not in the courts. As previously noted (see note 2, *supra*), Congress is aware of petitioners' concerns but has not acted to provide the relief they seek.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7]Petitioners' additional arguments require only brief mention. First, petitioners renew their contention that they "have stated a cause of action based on contract" (Pet. 16). In light of the appropriations contingency clause, however, it is clear that there could be no breach of the 1943 contract, even assuming that petitioners have standing to sue under the agreement. Petitioners also claim (Pet. 17-18) that the failure to provide vehicular access constitutes a burden on the practice of their religion. It is undisputed, however, that no one has been denied the right to visit the cemeteries; indeed, it is admitted (Pet. 10) that "[t]he cemeteries have been visited by the petitioners and their relatives since 1943." Because free boat access is provided, see note 1, *supra*, petitioners have not demonstrated that the lack of vehicular access substantially burdens their religious practices. In any event, "the free exercise clause places a duty upon [the government] to keep from prohibiting religious acts, not to provide the means * * * for carrying them out." *Crow* v. *Gullet*, 541 F. Supp. 785, 791 (D.S.D. 1982), aff'd, 706 F.2d 856 (8th Cir. 1983), cert. denied, 464 U.S. 977 (1983).

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